has been, in a given instance, defeated, or is about to be defeated. Its wholesome purpose is to invite inquiry into the conduct of popular elections, and every means legally proper will be made use of by the court to reach the very right of the case. The foregoing opinion is important in enunciating clearly that no person should be permitted to occupy an elective office who has not received a majority of the votes cast at the election.

In states where the statutes require that the ballots shall be preserved by certain officers, they become, when so preserved, in effect record evidence, and no presumption can arise that they have been altered or tampered with. *People* v. *Holden*, *supra*.

The ballots and not the returns of the election officers are the foundation of the right to hold an office. Election officers for the most part perform ministerial duties and functions only; their returns and the certificate of election issued upon them are never conclusive in favor of the officer who would thereby appear to be chosen, but the final decision must rest with the court. Cooley Const. Lim., sect. 623. E.

Supreme Court of the United States.

JOHN GOOD *v.* IDA MARTIN.

Where a promissory note made payable to a particular person or order is first endorsed by a third person, such third person is held to be an original promisor, guarantor or endorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place.

If he put his name in blank on the back of the note at the time it was made, and before it was endorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note.

If his endorsement was subsequent to the making of the note and to the delivery of the same to take effect, and he put his name there at the request of the maker, pursuant to a contract of the maker with the payee for further indulgence or forbearance, he can only be held as guarantor, and he is not liable without legal proof of consideration for the promise, unless it be shown that he was connected with the inception of the note.

If the note was intended for discount, and he put his name on the back with the understanding of all the parties that his endorsement would be inoperative until the instrument was endorsed by the payee, he is liable only as a second endorser in the commercial sense, and as such is entitled to the privileges which belong to such an endorser.

A person so signing cannot in any case be a first endorser. He may be a second endorser, but in the absence of any statement by him at the time he is presumed to have signed as a joint maker or guarantor, according as he signs at the making of the note or afterwards, and as he participates or not in the original consideration.

Parol evidence is admissible to show the circumstances under which he signed, as they bear upon the foregoing rules.

Territorial courts are not courts of the United States in such sense as to make parties witnesses in them where there is a different rule prescribed by the territorial statutes.

ERROR to the Supreme Court of the territory of Colorado.

The opinion of the court was delivered by

CLIFFORD, J.—Decisions of a conflicting character exist as to the nature and legal effect of the obligation which a third person assumes, who endorses his name in blank on a negotiable promissory note before the payee and before the instrument is delivered to take effect. Courts of justice, in some jurisdictions, hold that such a party is a second endorser, even though it be true that the payee may never endorse the instrument: *Phelps* v. *Vischer*, 50 N. Y. 69; *Shafer* v. *Bank*, 59 Penna. St. 148.

Even elementary rules show that he cannot be first endorser, for the reason that he is not payee, and it is well settled law that no one but the payee can sustain that relation to the maker, or put the note in circulation as a negotiable instrument: *Essex Co.* v. *Edmunds*, 12 Gray 276; *Moies* v. *Bird*, 11 Mass. 440.

Three of the counts of the declaration are framed upon a promissory note, dated June 29th 1866, payable to Alexander Davidson, or order, sixty days after date, signed by the first two defendants, and the record shows that it was endorsed by the other defendant before it was endorsed by the payee, and before it was delivered to take effect as a negotiable instrument. His endorsement was in blank, and of course was without any written explanation as to its nature and intended effect.

Besides the three counts framed upon the promissory note, the declaration also contained the common counts, in which it was alleged that the defendants were indebted to the plaintiff in the sum of $2000 for work and labor done and performed, and in the same sum for goods, wares and merchandise sold and delivered, and in the same sum for money had and received, and other counts in *indebitatus assumpsit.*

Service was made, but the two defendants first named failed to appear, and were defaulted. Instead of that the other defendant appeared, pleaded the general issue, and went to trial. Evidence was introduced on both sides, and the verdict and judgment were for the plaintiff in the sum of $3625.33. Exceptions were filed by the defendant, who went to trial, and he sued out a writ of error, and removed the cause into this court.

Only two of the exceptions are embodied in the assignment of errors, and those only will be re-examined. 1. That the court

erred in instructing the jury that if they found from the evidence that the defendant wrote his name upon the back of the note before the delivery of the same to the payee, and that he did not then make any statement of his intention in so doing, he is presumed to have done so as the surety of the makers and for their accommodation, to give them credit with the payee, and is liable for the payment of the note in this action; and that if that presumption is not rebutted by the evidence in the case, they must find for the plaintiff in the issue, joined between her and the last-named defendant. 2. That the court erred in excluding the testimony of the two defendants called as witnesses by the defendant, who appeared and went to trial.

Decided cases almost innumerable affirm the rule that if one, not the promisee, endorses his name in blank on a negotiable promissory note before it is endorsed by the payee, and before it is delivered to take effect as a promissory note, the law presumes that he intended to give it credit, by becoming liable to pay it either as guarantor, or as an original promissor: *Bryant* v. *Eastman*, 7 Cush. 113; *Benthal* v. *Judkins*, 13 Met. 267; *Colburn* v. *Averill*, 30 Me. 317.

Different courts, as remarked in that case, hold different views in respect to the question here involved, but all concur that such an act constitutes a contract which is to receive a reasonable and an available construction. Great conflict exists in the decided cases, but the better opinion is that there are certain general rules and principles to be followed in the interpretation of such a contract, which, in the absence of other evidence, will lead to satisfactory results, even amid the conflicting decisions.

Beyond all doubt the contract should be construed as it was at the time it was made. If made at the inception of the note, it is presumed to have been for the same consideration, and a part of the original contract expressed by the note. If made subsequently to the date of the note, and without a prior endorsement by the payee, it will be presumed that it was not made for the same consideration, and the party, if liable at all, will be regarded as a guarantor. Such a contract to guaranty the debt of a third person must be in writing, and there must be sufficient proof of the consideration: *Brewster* v. *Silence*, 4 Seld. 211; *Leonard* v. *Vredenburg*, 8 Johns. 18; *Hall* v. *Farmer*, 5 Denio 484.

These remarks apply where the third person endorses the note before the payee, but where such a person endorses the note after a prior endorsement by the payee, the law presumes it to have been done in aid of the negotiation of the note, and the party will be regarded as a subsequent endorser, the rule being that if the endorsement is without date, it will be presumed to have been made at the inception of the note: *Ranger* v. *Carey*, 1 Met. (Mass.) 373; *Noxon* v. *De Wolf*, 10 Gray 760; *Collins* v. *Gilbert*, 4 Otto 760.

Irregularities of the kind in the execution of promissory notes are noticed by Judge STORY in his work on Promissory Notes, and he says that the maker and such a party are both to be deemed original promissors, and the note a joint and several promissory note to the payee, although as between the maker and the other party they stand in the relation of principal and surety. Standard authorities, too numerous for citation here, are referred to by the author in support of the proposition: Story on Promissory Notes, § 58; *Sylvester* v. *Downer*, 20 Vt. 358; *Lewis* v. *Harvey*, 18 Mo. 76; 1 Parsons on Contracts, 6th ed., 243.

None will deny, it is presumed, that the cases cited sustain the proposition where the third person endorses his name in blank on the note at the time when it was made, and before it was endorsed by the payee; and the same learned author admits that the rule would be otherwise if the party actually wrote his name at a subsequent period, unless it was done in compliance with an agreement made before the note was executed; *Hawkes* v. *Phillips*, 7 Gray 286; *Leonard* v. *Wilder*, 36 Me. 268; *Champion* v. *Griffith*, 13 Ohio 239. Prior decisions of this court are to the same effect, as appears by the following citation: *Rey* v. *Simpson*, 22 How. 350.

When a promissory note made payable to a particular person or order is first endorsed by a third person, such third person is held to be an original promisor, guarantor, or endorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place.

1. If he put his name in blank on the back of the note at the time it was made, and before it was endorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note: *Schneider* v. *Schiffman*, 20 Mo. 571; *Irish* v. *Cutler*, 31 Me. 537.

2. Reasonable doubt of the correctness of that rule cannot be entertained; but if his endorsement was subsequent to the making of the note and to the delivery of the same to take effect, and he put his name there at the request of the maker, pursuant to a contract of the maker with the payee for further indulgence or forbearance, he can only be held as guarantor, which can only be done where there is legal proof of consideration for the promise, unless it be shown that he was connected with the inception of the note.

3. But if the note was intended for discount, and he put his name on the back of the note with the understanding of all the parties that his endorsement would be inoperative until the instrument was endorsed by the payee, he would then be liable only as a second endorser in the commercial sense, and as such would clearly be entitled to the privileges which belong to such an endorser.

Considerable diversity of decision, it must be admitted, is found in the reported cases where the record presents the case of a blank endorsement by a third party, made before the instrument is endorsed by the payee, and before it is delivered to take effect, the question being whether the party is to be deemed an original promisor, guarantor or endorser. Irreconcilable conflict exists in that regard, but there is one principle upon the subject almost universally admitted by them all, and that is that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties, and in most cases it is admitted that proof of the facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed: *Denton* v. *Peters*, Law Rep. 5 Q. B. 475.

Facts and circumstances attendant at the time the contract was made are competent evidence for the purpose of placing the court in the same situation, and giving the court the same advantages for construing the contract which were possessed by the actors: *Cavazos* v. *Trevino*, 6 Wall. 784.

Courts of justice may acquaint themselves with the facts and circumstances that are the subjects of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described: *Shore* v. *Wilson*, 9 Cl. & Fin. 569; *Clayton* v. *Grayson*, 4 N. &

M. 606; Addison on Contracts, 6th ed., 918; 2 Taylor's Ev., 6th ed., 1035.

Evidence to show that the endorsement of the defendant in this case was made before the instrument was endorsed by the payee, or delivered to take effect, was admitted without objection, but it is not necessary to rest the decision upon that suggestion, as it is clear that the evidence would have been admissible even if seasonable objection had been made to its competency: *Hopkins* v. *Leek*, 12 Wend. 105.

Like a deed or other written contract, a promissory note takes effect from delivery, and as the delivery is something that occurs subsequent to the execution of the instrument, it must necessarily be a question of fact when the delivery was made. Parol proof is therefore admissible to show when that took place, as it cannot appear in the terms of the note: 2 Taylor's Ev., 6th ed., 1001; *Hall* v. *Cazenove*, 4 East 477; *Cooper* v. *Robinson*, 10 Mee. & Wels. 694.

Opposed to that, the suggestion is, that if a holder produces a note having a blank endorsement of one not the payee, the presumption is that it was made at the inception of the instrument: *Childs* v. *Wyman*, 44 Me. 441. Grant that, and still it is a mere presumption of fact, which may be rebutted and controlled by parol proof, that it was not there when the note was delivered, or that it was made at a subsequent date: *Essex Co.* v. *Edmunds*, 12 Gray 278.

Third persons endorsing a negotiable promissory note before the payee, and before it is delivered to take effect, cannot be held as first endorsers, for the reason that they are not payees, and no party but the payee of the note can be the first endorser and put the instrument in circulation as a commercial negotiable security. Such a third party may, if he chooses, take upon himself the limited obligation of a second endorser, but if he desires to do so, he must employ proper terms to signify that intention, the rule being, that a blank endorsement supposes that there are no such terms employed and that he is liable either as promisor or guarantor.

Blank endorsements may be filled up to express the legal contract, and the true commercial rule is that when the blank is filled the instrument shall have the character of a written instrument, and not depend on parol proof to give it effect, nor be subject to be altered or contradicted by parol proof. Endorsements of the kind are or

may be valid, as the law presumes that such an endorser intended to be liable in some form. It does not charge him as endorser unless the terms employed are proper to express such an intent; but if any one, not the payee, of a negotiable note, or in the case of a note not negotiable, if any party writes his name on the back of the note, at or sufficiently near the time it is made, his signature binds him in the same way as if it was written on the face of the note, and below that of the maker, that is to say, he is held as a joint and several maker, according to the form of the note. Cases also arise where the signature of a third person is subsequent to the making and delivery of the note, and in that case the third person, as to the payee, is not a maker but a guarantor, and his promise is void if without consideration, but the consideration may be the original consideration if the note was received at his request and upon his promise to guarantee the same, or if the note was made at his request and for his benefit: 1 Pars. on Cont., 6th ed., 244.

Judge STORY says, that the interpretation ought to be just such as carries into effect the true intention of the parties, which may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. If the party intended at the time to be bound only as guarantor of the maker, he shall not be an original promisor, and if he intended to be liable only as a second endorser, he shall never be held to the payee as first endorser: Story on Promissory Notes, § 479.

Where the evidence on these points is doubtful, obscure or totally wanting, courts of law adopt rules of interpretation as furnishing presumptions as to the actual intention of the parties. Difficulty in that regard can never arise where the endorsement is special, if it contains words proper to show that the party intended to be liable only as second endorser. Where the endorsement is in blank, if made before the payee, the liability must be either as an original promisor or guarantor, and parol proof is admissible to show whether the endorsement was made before the endorsement of the payee, and before the instrument was delivered to take effect, or after the payee had become the holder of the same; and if before, then the party so endorsing the note may be charged as an original promisor, but if after the payee became the holder, then such a party can only be held as guarantor, unless the terms of the endorsement show that he intended to be liable only as second endorser, in which

event he is entitled to the privileges accorded to such an endorser by the commercial law.

Whether regarded as a second endorser or an original promisor, it is not necessary to allege or prove any other than the original consideration, but if it be attempted to charge the party as a guarantor, a distinct consideration must appear: *Essex County* v. *Edmunds*, 12 Gray 277; *Brewster* v. *Silence*, 4 Selden 207.

Viewed in the light of these suggestions, it is clear that the first assignment of error must be overruled.

2. Territorial courts are not courts of the United States within the meaning of the constitution, as appears by all the authorities: *Clinton* v. *Englebrecht*, 13 Wall. 447; *Hornbuckle* v. *Toombs*, 18 Id. 653.

Witnesses in civil cases cannot be excluded in the courts of the United States because he or she is a party to, or interested in, the issue tried; but the provision has no application in the courts of a territory, where a different rule prevails: 13 Stats. at Large 351; *Bowman* v. *Noyes*, 12 N. H. 305; *Bridges* v. *Armour*, 5 How. 94; *Bailey* v. *Knapp*, 7 Harris 193; *Hatz* v. *Snyder*, 2 Casey 512.

Suppose that is so, then the two defendants called as witnesses were rightly rejected as witnesses: 13 Stats. at Large 351.

Special reference is made to the territorial Act of the 11th of February 1870, as inconsistent with the ruling of the court, but the act in question contains the following proviso: that the act "shall not apply to cases pending at the passage thereof in the district courts, on appeals from justices of the peace, nor to cases at issue at the passage of the same in the district and probate courts." Sufficient appears to show that the case before the court was at issue in the court below one whole year before the passage of that act.

Tested by these considerations, it is clear that the second assignment of error must also be overruled, and that there is no error in the record.

Judgment affirmed.